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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

STUBBLEFIELD CONSTRUCTION COMPANY AND
STUBBLEFIELD PROPERTIES,

Petitioners,

v.

CITY OF SAN BERNADINO,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of California Fourth Appellate District, Division Two

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS, BUILDING INDUSTRY LEGAL DEFENSE FONDATION, THE NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES, THE NATIONAL REALTY COMMITTEE, THE NATIONAL MULTI HOUSING COUNCIL AND THE TEXAS CAPITOL AREA BUILDERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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1 Anderson, American Law of Zoning, Fairly debatable issue, § 3.20 (3d ed. 1986 and Dec. 1994 Cum. Supp.).32

In The

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No. 95-114

STUBBLEFIELD CONSTRUCTION COMPANY and
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v.

CITY OF SAN BERNARDINO,

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BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS, THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION, THE NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES, THE NATIONAL REALTY COMMITTEE, THE NATIONAL MULTI HOUSING COUNCIL and THE TEXAS CAPITOL AREA BUILDERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

The National Association of Home Builders ("NAHB"), the Building Industry Legal Defense ("BILD") Foundation, the National Association of Industrial and Office Properties ("NAIOP"), the National Realty Committee ("NRC") the National Multi Housing Council ("NMHC"), and the Texas Capitol Area Builders Association ("TCABA") have received the parties' written consent to file this brief as *amici curiae* in support of the petitioner and have filed the letters of consent with the Clerk of the Court.

I.
THE INTERESTS OF THE AMICI CURIAE ARISE FROM THEIR MEMBERS' CONCERNS AS TO THEIR ABILITY TO OBTAIN JUDICIAL REVIEW OF ACTIONS WHICH INVOLVE THE USE OF LAND

The NAHB represents over 180,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single family homes but also apartment, condominium, commercial, and industrial builders, as well as land developers or remodelers. It is the voice of the American shelter industry.

It is, therefore, concerned with any judicial decision that calls into question the right of its members to use their land and, when their right to use land is unduly interfered with by local governmental actions, to seek judicial review of those actions.

The NAHB has been before the Court as an *amicus curiae* or as "of counsel" to the property owner in a number of cases involving the rights of landowners to use their property and the remedy to be applied when those rights are interfered with. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), *Nollan v. California Coastal*

Commission, 483 U.S. 825 (1987),[1/] and *Dolan v. City of Tigard*, - U.S. -, 114 S.Ct. 2309 (1994).

The BILD Foundation is a wholly owned subsidiary of the Building Industry Association of Southern California, a constituent part of the NAHB, whose 1,400 members include a significant number of residential developers and associate businesses that take part in building 70% of all new residential units annually in the Southern California region.

NAIOP is a professional organization of 5,000 individuals engaged in owning, managing, and developing industrial and office buildings in the United States and internationally. Its members include not only the nation's leading commercial real

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[1] The Court's opinion cited the NAHB's brief. 483 U.S. at 840.

estate developers, but also architects, brokers, master planners, engineers, property managers, banks, insurance companies, and other real estate financial groups.

The NRC serves as real estate's roundtable in Washington where it leads the active involvement of the nation's principal real estate owners, advisors, builders, investors, lenders, and managers in the national policy process.

The NMHC is a national association representing the interests of the nation's largest owners and operators of multi-family rental housing. Its members are engaged in all aspects of the development and operation of rental housing including ownership, building, financing, and management involving millions of rental housing units. Since its formation in 1978, the NMHC has been

actively involved in all facets of public policy that are of strategic importance to participants in the multifamily housing industry.

The TCABA is a trade organization with over 700 members who are single and multi-family house builders, land developers, remodelers, and product or service companies involved in the house building industry.

The *amici curiae* submit their *amici curiae* brief in support of the petitioners in the present case in order to assist the Court in determining whether to grant its writ of certiorari to determine if the property protected by the Fifth and Fourteenth Amendments to the Federal Constitution inheres in the ownership of land or if, as asserted by several of the federal circuits and the state courts which have begun to follow

those circuits, the existence of a protected property right in the use of land exists only when government has no discretion with respect to that use.

II.

SUMMARY OF THE ARGUMENT

The petitioners' brief in support of their petition for certiorari has pointed out that the decision in the case at bar followed the courts of appeals for several of the federal circuits which have adopted an "entitlement" theory to determine when a property right worthy of constitutional protection exists; a theory which holds that the property right protected by the Fifth and Fourteenth Amendments to the federal Constitution arises in the land use context only when the use of that land is not subject to discretionary governmental

regulation, i.e., when the approval sought must be granted. This is contrary to the decisions of this Court which have held that the property right protected by the Constitution is the right to use land subject, of course, to reasonable regulation.

The adoption of the entitlement theory has the effect of stripping land of all constitutional protection which is neither correct nor necessary. The concerns which have been identified by the circuits which have adopted the entitlement theory have centered primarily on fears that a broader recognition of what constitutes property in the land use regulation context will cause the federal courts to become super boards of zoning appeals, substituting their views of what constitutes reasonable land use regulation for that

of the properly constituted local governmental authorities. These fears are without foundation.

Other mechanisms, including the abstention doctrine set forth over 50 years ago in *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), and the deferential "fairly debatable" rule set forth 70 years ago in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), guarantee that the federal courts will not become boards of zoning appeals which will substitute their own judgments for those of local land use authorities.

The intended effect of the adoption of the entitlement theory by the federal courts is to force land use cases back into state courts. The unintended result has been an uncritical adoption of the entitlement theory by some state courts which means, in those states, that a

landowner is stripped of constitutional protection in the land use regulation context regardless of where judicial review is sought. While abstention is not available in state courts, the same deferential "fairly debatable" rule is routinely used.

Although the present petition seeks review of a state court decision, the stakes are much higher. Review by this Court is necessary to tell both federal and state courts whether the Fifth and Fourteenth Amendments have any application at all in the land use regulation context.

III.

THE COURTS OF APPEALS AND THE STATE COURTS THAT HAVE EMPLOYED THE ENTITLEMENT ANALYSIS HAVE DISREGARDED ALMOST A CENTURY OF THIS COURT'S ANALYSIS OF WHAT CONSTITUTES PROPERTY

This Court has held that the use of land is part of the property protected by the Fifth and Fourteenth Amendments.

> "And the Court has frequently emphasized that the term 'property' as used in the Taking Clause includes the entire 'group of rights inhering in the citizen's [ownership].' *United States v. General Motors Corp.*, 323 U.S. 373 (1945). The term is not used in the 'vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] ... denote[s] the *group of rights* inhering in the citizen's relation to the physical thing, *as the right to possess, use and dispose of it.* ... The constitutional provision is addressed to *every sort of interest* the citizen may possess.' *Id.*, at 377-378 (emphasis added)." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 142-143 (1978)(Rehnquist, J., dissenting).

In the absence of zoning, the owner of land has the right to use that land for any purpose not prohibited by the

common law of nuisance. *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 681 (1976)(Stevens, J., dissenting). For this reason, the Court has held that the property right inheres in the ownership of land.

> "The right of the [landowner] to devote its land to any legitimate use is property within the protection of the Constitution." *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928).

The Court has also held that the use of land is not a governmental benefit but, rather, a right, the exercise of which "can be subjected to legitimate permitting requirements...." *Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987).

IV.

THIS COURT HAS ANALYZED GOVERNMENTAL INTERFERENCE WITH THE USE OF LAND WITHOUT EVER CONCERNING ITSELF WITH THE EXISTENCE OF DISCRETION IN THE LAND USE REGULATORY AGENCY WHOSE ACTIONS HAVE BEEN QUESTIONED

Property, in the land use regulation context, receives its constitutional protection under the Fifth Amendment, which prohibits the federal government from taking property without the payment of just compensation, and the Fourteenth Amendment, which prohibits the states from depriving anyone of property without due process of law and which also incorporates the Fifth Amendment's prohibition against uncompensated takings. *Dolan v. City of Tigard*, - U.S. -, 114 S.Ct. 2309, 2316 (1994).

It is precisely because the Court has held that it is the ownership of land which is the property right to be protected by the Fifth and Fourteenth

Amendments that it has repeatedly reviewed actions taken by federal and state agencies when landowners have contended that those actions have violated their constitutional rights.

Further, the Court's repeated willingness to review land use cases demonstrates its continued adherence to the fact that "individual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Property*, - U.S. -, 114 S.Ct. 492, 505 (1993).

A. The Court Has Analyzed Actions By Local Governments To See If Land Use Regulations Deprived Landowners Of Their Rights To Due Process

There are a number of cases where the Court has looked to see whether actions taken by local governmental agencies involving the regulation of land have violated the landowners' Fourteenth

Amendment's right to due process. These include *Dobbins v. City of Los Angeles*, 195 U.S. 223 (1904), *Welch v. Swasey*, 214 U.S. 91 (1909), *Eubank v. City of Richmond*, 226 U.S. 137 (1912), *Reinman v. City of Little Rock*, 237 U.S. 171 (1915), *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526 (1917), *Pierce Oil Co. v. City of Hope*, 248 U.S. 498 (1919), *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), *Zahn v. Board of Public Works*, 274 U.S. 325 (1927), *Gorieb v. Fox*, 274 U.S. 603 (1927), *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), *State of Washington ex rel. Seattle Trust Co. v. Roberge*, 278 U.S. 116 (1928), *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), *City of Eastlake v. Forest City Enterprises*,

Inc., 426 U.S. 668 (1976), *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), and *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985).

All of these cases recognized that the use of land may be regulated but that the regulations must be reasonable; local governmental agencies do not have the right to act in an arbitrary or capricious manner when they regulate the use of land.

> "The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare." *Nectow*, *supra*, 277 U.S. at 188.

Nectow involved a landowner's desire to obtain a building permit but the Court did not review Cambridge's building code to determine whether the landowner was entitled to that permit as a matter of right nor whether the City had the discretion to grant or withhold it. *Nectow* does not stand alone; in none of the cases cited above did the Court explore, or even mention, the fact that the actions involved were discretionary.

B. The Court Has Analyzed Land Use Regulatory Action By The Federal Government To See If Those Actions Have Taken The Land Affected By Them

The Court has analyzed actions by the federal government to determine whether actions involving the use of land have taken land under the Fifth Amendment. These include *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), and

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).

Both *Kaiser Aetna* and *Riverside Bayview* involved discretionary dredge and fill permits administered by the Army Corps of Engineers. 33 U.S.C. §§ 403 and 1344. The Court did not explore, or even mention, the fact that the permits were discretionary.

C. The Court Has Analyzed Land Use Regulatory Actions By Local Governments To See If Those Actions Have Taken The Land Affected By Them

The Court has analyzed a number of actions involving land use by state and local governments to determine whether the result was a taking which required the payment of just compensation under the Fifth Amendment as made applicable to

the states by the Fourteenth Amendment[2/]. These include *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987), *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Lucas v. South Carolina Coastal Council*, - U.S. -,

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2/ The fact that the Due Process Clause of the Fourteenth Amendment incorporates the Takings Clause of the Fifth Amendment demonstrates that the meaning of property under both Amendments is the same.

112 S.Ct. 2886 (1992), and *Dolan v. City of Tigard*, - U.S. -, 114 S.Ct. 2309 (1994).

Every one of these cases involved a discretionary act by the state or local government involved - either the imposition of a restriction on the use of the land involved or the denial or conditional approval of a land use permit. In none of the cases did the Court explore, or even mention, the fact that the action under review was discretionary.

D. The Court Recognized The Existence Of A Property Right In The Use Of Land In Every One Of The Land Use Cases It has Reviewed

The important issue in every one of the cases cited above is not whether the landowner won or lost; instead, it is the fact that the Court addressed the issue

of whether governmental action constituted an improper interference with the landowner's property rights. The rule set down by the Court is that, before any federal court considers whether a constitutional right has been violated, the existence of that constitutional right must be demonstrated. *Siegert v. Gilley*, 500 U.S. 226 (1991).

When it comes to the property right in question in cases where the issue is the effect of governmental regulation on the use of land, the Court could not have been clearer. See *Roberge* and *Nollan*, *supra*. However, even if the clear statements in *Roberge* and *Nollan* had never been made, history and common sense indicate that constitutional protection was meant to be provided whenever government regulates the use of land.

Lucas, supra, 112 S.Ct. at 2899-2900 (ownership of real property enjoys more protection than ownership of personal property). *See also Minnesota Mining Co. v. National Mining Co., 70 U.S. (3 Wall.) 332, 334 (1866)(stare decisis particularly important when real property is involved).*

V.

USING THE ENTITLEMENT THEORY OF PROPERTY WOULD READ THE PROTECTION OF LAND RIGHT OUT OF THE CONSTITUTION

The petition has identified the federal circuits which have adopted the entitlement theory. (Petition at 19-25.) The case at bar demonstrates that their views have begun to influence state courts. California does not stand alone; other state courts have also adopted the entitlement theory. See, e.g., *Red Maple Properties v. Zoning Commission*, 222

Conn. 730, 610 A.2d 1238 (1992), which relies on Second Circuit case law, and *Boulder City v. Cinnamon Hills Associates*, 110 Nev. 238, 871 P.2d 320 (1994), and *Security Management Corp. v. Baltimore County*, 104 Md.App. 234, 655 A.2d 1326 (1995), both of which rely on Fourth Circuit cases.

If those circuits and those states which use the presence of discretion in land use regulation[3/] to determine the nonexistence of property rights are correct, then a landowner has no property

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3/ Discretion, in the land use regulation context, means that the government has the right to deny or impose conditions on a landowner's application. There is no discretion only when there is a "certainty or a very strong likelihood" that the approval will be granted and "the opportunity of the local agency to deny issuance" is virtually nonexistent as a matter of law. *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 918 (2d Cir.), *cert denied*, 493 U.S. 893 (1989).

rights under either the Fifth or the Fourteenth Amendment. Applying the entitlement theory would mean that government - federal, state, or local - could regulate the use of land through discretionary land use approvals but that, having done so, it would not then be required to provide the protection of procedural due process nor would it be subject to either the limitations of substantive due process or the just compensation requirement of the Fifth Amendment.

The simplest example is, of course, the imposition of zoning itself. *Village of Euclid*, supra, upheld the validity of the adoption of a comprehensive zoning plan for the entirety of the village, surely a discretionary act. However, if the presence of discretion is enough to strip land of its status as property,

then how can the Court's decision in *Lucas v. South Carolina Coastal Council*, *supra*, be explained? In *Lucas*, the Coastal Council drew a line in the sand and said that there could be no development seaward of that line. Certainly no one would argue that the Coastal Council did not have the discretion to determine what uses, if any, would be allowed seaward of the line. But, if the entitlement theory applies, then the discretion inherent in the Coastal Council's determination as to what uses would be allowed seaward of the line would have meant that there was no property right involved and therefore no possibility that Mr. Lucas's land could have been taken as a result of the Coastal Council's action.

The same thing is true when it comes to the issuance of a discretionary land

use permit. *Dolan* and *Nollan*, *supra*, involved precisely that situation. There was no question that both the California Coastal Commission and the City of Tigard had discretion as to whether to issue land use permits and, if so, what conditions to impose on the issuance. Neither Mrs. Dolan nor Mr. and Mrs. Nollan could have prevailed on their claims that the conditions imposed on the issuance of the permits took their land if the existence of discretion meant that they had no property rights subject to the protection of the Constitution.

In other words, if the entitlement theory is correct, then no landowner has any protectable property right in the use of that land if discretionary land use permits are required. Moreover, the necessary corollary is that this Court wrongly decided a score of cases,

beginning in 1904 and culminating in *Dolan*, *Nollan*, and *Lucas*.

VI.

EXPEDIENCY AND A DESIRE TO AVOID DEALING WITH LAND USE ISSUES DO NOT JUSTIFY STRIPPING LANDOWNERS OF THEIR CONSTITUTIONAL PROTECTION

The Court has made it clear that the federal courts have a "virtually unflagging obligation" to exercise their jurisdiction. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976). The exceptions to that obligation are few and far between. *Ankenbrandt v. Richards*, - U.S. -, 112 S.Ct. 2206, 2210 (1992)(domestic relations), and *Markham v. Allen*, 326 U.S. 490, 494 (1946)(probate). Neither a dislike of the subject matter[4/] nor a

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/ The clearest example of the dislike shown by some federal courts may be found in *River Park, Inc. v. City of Highland*

desire to remove cases from dockets are among the reasons that the Court has given for refusing or abstaining from the exercise of jurisdiction. *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350 (1989), *Colorado River, supra, Younger v. Harris*, 401 U.S. 37 (1971), *Burford v. Sun Oil*

Park, 23 F.3d 164, 165 (7th Cir. 1994):

> "Federal courts are not boards of zoning appeals. This message, oft-repeated, has not penetrated the consciousness of property owners who believe that federal judges are more hospitable to their claims than are state judges. Why they should believe this we haven't a clue; none has ever prevailed in this circuit, ..."

In fairness to the Seventh Circuit, it must be pointed out that the Court of Appeals recognized that the property right inhered in the ownership of the land, that zoning is a limitation on the uses which would otherwise be available, and that allowing government to impose land use regulations does not mean that those regulations are unreviewable. *Id.*, 23 F.3d at 165-166.

Co., 319 U.S. 315 (1943), and *Railroad Commission v. Pullman Co.*, *supra*.

The circuits which have adopted the entitlement theory frequently refer to their desire not to become boards of zoning appeals, with or without a cite to Justice Marshall's dissent in *Village of Belle Terre*, *supra*, 416 U.S. at 13. See, e.g., *Gardner v. City of Baltimore Mayor and City Council*, 969 F.2d 63, 68 (4th Cir. 1992), and *RRI Realty Corp.*, *supra*, 870 F.2d at 918. Unfortunately, they never refer to the fact that, while Justice Marshall did not want to see federal courts substitute their judgments for those of local land use author-ities, neither did he want to see federal courts abdicate their obligation to provide constitutional oversight of those judg-ments. *Id.*, 416 U.S. at 14. His dissent argued that the Court had erred and that

it should have held the village's ordinance limiting the number of unmarried residents who could occupy a single family home unconstitutional. *Id.*, 416 U.S. at 20.

The circuits which have adopted the entitlement theory have recognized that, in many cases, the result will be that arbitrary actions - whether substantive or procedural - will go unreviewed and unremediated. See, e.g., *Triomphe Investors v. City of Northwood*, 49 F.3d 198, 201-204 (6th Cir.), *petition for cert. filed* (1995)(No. 94-1991)(substantive), *Sylvia Development Corp. v. Calvert County*, 48 F.3d 810, 826-828 (4th Cir. 1995)(procedural and substantive), and *Sequin v. City of Sterling Heights*, 968 F.2d 584, 590-592 (6th Cir. 1992)(procedural).

There are already ways to ensure that federal courts do not cross the line and unduly interfere with the judgments of local land use regulators.

First, if there are substantial, unresolved questions of state law which would obviate the need for a constitutional decision, *Pullman* abstention is available. See, e.g., *Fields v. Rockdale County*, 785 F.2d 1558 (11th Cir. 1986), and *Pearl Investment Co. v. City and County of San Francisco*, 774 F.2d 2460, *cert. denied*, 476 U.S. 1170 (1986).

Second, when a constitutional decision is required, the decision of the local land use authority must be upheld if that decision is "fairly debatable." *Village of Euclid*, *supra*, 272 U.S. at 388. This deferential standard of review is, by itself, a guarantee that federal

courts will not become boards of zoning appeals.

The possibility that courts will substitute their views for those of the local governmental authorities charged with the responsibility for regulating land use is as of much concern to state courts as it is to federal courts and the solution is the same. The "fairly debatable" standard has been adopted by virtually every state court. 1 Anderson, American Law of Zoning, Fairly debatable issue, § 3.20 (3d ed. 1986 and Dec. 1994 Cum. Supp.).

In other words, there is no institutional reason why land use regulation should not continue in the future to receive the same constitutional protection that the Court has accorded it in the past and no reason why that protection cannot be provided in either

the federal or the state courts of the nation.

VII.

CONCLUSION

The Court in *Board of Regents v. Roth*, 408 U.S. 564, 571-572 (1972), intended to extend the protection provided by the Fourteenth Amendment beyond that provided to land:

> "The Court has also made clear that the property interest protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." [Footnote omitted.]

It is no accident that the courts of appeals and the state courts which have adopted the entitlement theory as the measure of the existence of a protected

property right when it comes to the regulation of the use of land have not cited the foregoing portion of *Roth* nor have they cited either *Roberge* or *Nollan*. Had they done so, they could never have come to the conclusion that the presence of discretion in land use regulation means that there is no property right which could possibly be in issue.

The right to use land, subject to reasonable regulation, is a property right protected by the Fifth and Fourteenth Amendments. That is the law as stated by the Court and it is binding on the Courts of Appeals and the District Courts until the Court chooses to change it. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 534, 535 (1983). Given the division amongst the

circuits[5/] and the clear misunderstanding of the law evidenced by those circuits and those state courts which have adopted the entitlement theory, it is necessary that the Court grant the petition for writ of certiorari in order to bring order to an increasingly disordered lower federal judiciary and, if the Court does not speak, to avoid the potential disappearance of constitutional protection for the owners of land in state courts.

5/ Two cases are presently before the Court seeking review on the very issue discussed in this brief. See *Triomphe Investors v. City of Northwood*, No. 94-1991, and *De Blasio v. Zoning Board of Adjustment*, No. 95-163. *Triomphe*, a Sixth Circuit case, followed the entitlement theory; *De Blasio*, a Third Circuit case, held that the property right inhered in the ownership of the land.

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